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No. 83-5954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE LINDAHL, *Petitioner*,

v.

OFFICE OF PERSONNEL MANAGEMENT, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The main issue in this case is whether the United States Court of Appeal for the Federal Circuit has jurisdiction pursuant to congressional enactments to review decisions of the Merit System Protection Board concerning claims for disability retirement of federal employees.

The Respondent, Office of Personnel Management, concedes that federal courts (claims court or district courts) do have jurisdiction to review the final decision of the Merit System Protection Board (Resp. Br. 8, 24, 31 and 50). It joins the Petitioner in asking this Court to "consider vacating the judgment below" (Resp. Br. 31 and 50). Respondent, no doubt, now recognizes that this Court has consistently held that retirement annuities under the Civil Service Retirement Act are a vested property right. *Dismuke* v. *United States*, 297 U.S. 167 (1936); *United States* v. *Clark*, 445 U.S. 23, 34 (1980) (Resp. Br. 18-19, 43).[1] Likewise, the Respondent realizes that the Federal Circuit below went too far in holding that it does not have jurisdiction to review an agency determination of a vested retirement annuity. This is especially so under the rubric of this Court that it will give judicial protection against unlawful agency action to rights conferred by Congress. *Leedom* v. *Kyne*, 385 U.S. 184, 190 (1958).

It appears that the Respondent also recognizes that the decision of the Federal Circuit below is inconsistent with the constitutional principle of separation of powers (Resp. Br. 31). Precluding all review is tantamount to withdrawing the power of the federal courts to decide whether agency action violated individual rights—either statutory, regulatory or constitutional.

But Respondent continues to argue that there is no direct jurisdiction under either Chapter 77 of the Civil Service Re-

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[1] In fact, the Respondent never challenges or opposes Petitioner's position that a retirement annuity is a vested property right. The Federal Circuit's decision also held the annuity was a right. (J.A. 46).

form Act,[2] the Federal Court Improvement Act,[3] or the Civil Service Retirement Act[4] (Resp. Br. 8, 9, 13, 20, 32). The issue of jurisdiction in this case turns on the intent of Congress in enacting this legislation and in protecting the rights of federal employees.[5] We described this intent in our opening brief, where we noted that Congress intended that the Federal Circuit have power to review agency violations of procedural or legal rights of federal employees in disability retirement cases to insure that the agency does not exceed its powers (Pet. Br. 10, 23, 31). Accordingly, the assertions of Respondent that Congress never intended Federal Circuit jurisdiction in this area are plainly incorrect.

1. Respondent does not deny that Congress intended to provide judicial review of agency action to federal employees whose claims or rights are affected by such action. Respondent also acknowledges that the courts have jurisdiction to review agency violation of employee rights (Resp. Br. 31, 50). However, in our opening brief we explained the three basis for jurisdiction of the Federal Circuit to review any final order or decision of the Merit System Protection Board (MSPB). This includes 28 U.S.C. 1295(a)(9), 28 U.S.C. 8347(d) and the general jurisdiction of the federal courts to protect statutorily granted rights (Pet. Br. 10, 29, 34). In our first basis for review we cite the clear language of the Federal Court Improvement Act of 1982 which specifically states that "the Federal Circuit shall have *exclusive* jurisdiction . . . of any appeal from a final order or final decision of the Merit System Protection Board pursuant to Sections 7703(b)(1) and 7703(d) of Title 5." Section 7703(b)(1) specifically states that "a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeal for the Federal Circuit." The language,

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[2] 5 U.S.C. § 7701, 7703.

[3] 28 U.S.C. § 1295(a)(9).

[4] 5 U.S.C. § 8334, 8347.

[5] See *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982).

we explained, could not be clearer. It covers any appeal from the final orders of the MSPB and includes decisions of the MSPB over disability retirement claims.

a. Under this Section the Respondent first argues that this Court should imply the exclusion of retirement appeals from jurisdiction under 28 U.S.C. 1295(a)(9) because Section 7703(a)[6] only grants a right of judicial review to an "employee or applicant for employment" while Section 8347(d) authorized appeals for "individuals" (Resp. Br. 21).[7]

The contention of Respondent is erroneous. "Employee" for purposes of Chapter 77 is defined by reference to the statute or regulation that conferred the right to appeal. *Piskadlo* v. *Veterans Administration*, 668 F.2d 82, 84 (1st Cir. 1982); *Perez* v. *Army and Air Force Exchange Service*, 680 F.2d 779, 782-787 (D.C. Cir. 1982). The subchapter on civil service retirement includes a definition for that subchapter at Section 8331(1)(A), which refers to the definition of employee under Section 2105. The crucial part of the statute covers "an individual who is—(1) appointed in the civil service by . . . (d) an individual who is an employee under this section." Thus, "employees" includes an appointed "individual." It would be illogical to reach the conclusion that once an employee is removed from service he (she) is immediately a "non-employee." If this were the correct interpretation, any employee separated from the service would not be entitled to disability retirement benefits under Section 8337(a) even though that provision for disability retirement specifically refers to "employee."

Even worse, to accept this argument of Respondent would deprive the Federal Circuit "of jurisdiction under Section 7703 of the many civil service removal petitions brought by terminated federal employees" which are reviewed daily by that

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[6] All Section references are to title 5, U.S.C., except where otherwise stated.

[7] Respondent fails to recognize that an individual includes employee.

court. *Bronger* v. *Office of Personnel Management*, 740 F.2d 1552 (Fed. Cir. 1984).

Likewise, in its regulation under the Back Pay Act (Section 5596) which entitled employees to back pay for unwarranted personnel actions, Respondent has recognized that employee means present or former employees. 5 C.F.R. section 550.803 (1983). It is most likely that Congress intended that former employees removed for cause or for reduction in force be entitled to an appeal under Chapter 77. Congress could not have intended for the review rights of employees seeking disability to depend on whether their claims were filed prior to or after separation or their status at the time their cases reached the MSPB or the court.

In this case, LINDAHL filed his claim for disability retirement on September 5, 1979. (R.I. 83-84). At that time, he was an employee of the Department of the Navy and remained an employee until October 5, 1979 (J.A. 17-20). So, the laborious arguments of the Respondent are meaningless on this issue.

However, let us assume that LINDAHL is not deemed to have filed until October 9, 1979, four days after his terminationk when he filed his formal request (J.A. 17-20). Using the same definition of employee as argued by the Respondent would prohibit LINDAHL from even applying for disability retirement. Section 8337 allows only employees to apply for disability retirement. Surely Congress could not have intended that LINDAHL would not be entitled to disability on that basis.

Since nearly all disability annuity applicants are former employees by the time their appeals reach the MSPB, it is clear that the wording 'any employee' in Section 7703(a)(1) and Section 8337 includes a former employee. *Raichovich* v. *United States Postal Service*, 675 F.2d 417, 420 (D.C. Cir. 1982); *Bronger* v. *Office of Personnel Management*, 740 F.2d 1552.[8]

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[8] Respondent has urged this Court to consider the question raised by *Bronger* and to resolve it under LINDAHL. (Resp. Br. 12-13, and

b. Respondent next argues that its position that Section 7703(b)(1) does not apply to retirement claims is also supported by Section 7701 which only applies to "employees," only concerns adverse actions, and that appeals from retirement claims are covered by Section 8347(d), which require the agency to prescribe regulations.

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n.4). It is submitted that such a procedure would be grossly inappropriate. Respondent cannot simultaneously seek to have this Court affirm the decision below in the instant case, and to reverse the decision of that Court in *Bronger*, simply by so requesting in its brief.

Furthermore, it is a well established and uniform course of appellate review procedure to decline to review questions not necessary to a decision by an appellate court. See, *e.g.*, *Sun Insurance Office* v. *Scott*, 284 U.S. 177, 52 S.Ct. 72, 74, 76 L.Ed. 2d 229 (1931). The Court of Appeals for the Federal Circuit in the opinion below specifically limited its holding as follows:

> We decide here only the question of our jurisdiction to hear the type of appeal before us, i.e., an appeal from an MSPB decision affirming the denial of a claim for annuity following a *voluntary physical disability* retirement, a decision reached by MSPB under the authority provided it in § 8347(d)(1).
>
> * * * *
>
> We need not, and hence do not, decide in this case whether all decisions of MPSB under § 8347(d)(1) are denied judicial review by § 8347(c). . . . It is enough to hold, as we do, that § 7703 does not make MSPB decisions on voluntary disability retirement claims appealable, either by claimants or by OPM, to this Court.

718 F.2d at 393, 399 (emphasis added). After the Brief for the Petitioner herein was filed with this Court, the Court of Appeals for the Federal Circuit decided *Bronger*, citing therein the above portion of *Lindahl*, and noting that the case before them "differs from, and is not controlled by *Lindahl*," given that it involved a claim for retirement benefits, and there was no issue of disability subject to 8347(c). Respondent's representation that two courts of appeals have reached a conclusion contrary to *Bronger* is simply wrong, given that both cases cited therein involved claims for disability retirement benefits. (Resp. Br. 13).

Petitioner is confident that this Court will reverse the decision below. But if this Court then holds that Lindahl's right to judicial

The court in *Bronger* stated that "OPM's position borders on the frivolous." *Bronger* v. *OPM*, 740 F.2d 1552. Section 7701(a) allows an employee to appeal to the MSPB from "any action which is appealable to the Board under any law, rule or regulation." Section 8347(d) provides for retirement claimants to exercise their appellate rights under Section 7701. Both provisions very clearly allow a person such as LINDAHL whose rights have been affected by OPM action on retirement benefits to appeal that decision to the MSPB. Section 7701 is not limited to employees as claimed by Respondent. *Hein* v. *OPM*, 1 M.S.P.B. 396, 400 (1980).

In fact, the MSPB has specifically held that Congress when it passed Section 7701 provided a broad grant of *de novo* review including the right for parties to appeal MSPB orders in retirement claims. *Chavez* v. *OPM*, 6 M.S.P.B. 343, 348 (1981). It held that Section 7701 applies in retirement cases, in part, because, "the Reform Act contains no provision for Board consideration of appeal, whether authorized under that act or under some other statutory or regulatory authority, which are not governed by Section 7701." *Id.* at 348-349. Under the view of MSPB, Section 7701 applies to all appeals heard by the MSPB, whether based on the Civil Service Reform Act or other statutory provisions. In *Chavez*, the MSPB rejected the contention that OPM action on a disability retirement application was not subject to *de novo* review by MSPB, as it had been

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review is controlled by *Bronger*, the only proper course is to remand this case to the Court of Appeals for the Federal Circuit (the court with exclusive jurisdiction for appeals from decisions of the MSPB), for application of its holding in *Bronger*.

If Respondent wishes to contest the holding of the Federal Circuit in *Bronger*, it must file a petition for writ of *certiorari* seeking review of *that* case in this Court. Should this Court deem it worthy of review, said petition may be granted and Respondent may then argue for a contrary result, at which time the other interested parties (e.g., *Bronger*, et al) may fully argue and brief their side.

previously by the Civil Service Commission under 5 C.F.R. 831.1205 and 772.307 (1978).[9]

The MSPB interpretation of Section 7701 deserves special deference since it is the "contemporaneous construction of a statue by [those] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Frazier* v. *MSPB*, 672 F.2d 150, 162 (D.C. Cir. 1982).

Likewise the Court of Appeals[10] have held that appeals to the MSPB are taken pursuant to Section 7701 in retirement cases. *Turner* v. *OPM*, 707 F.2d 1499, 1501 (D.C. Cir. 1983).

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[9] The Respondent mistakenly states that the construction of Section 7701 excludes retirement claims and is consistent with Civil Service Commission and court actions practice prior to 1978 which treated adverse actions and retirement claims differently (Resp. Br. 17-20).

Prior to 1978, Congress authorized the Civil Service Commission to prescribe regulations to administer the rights of federal employees within the executive branch including appeals from adverse actions and disability and dependency claims. See Sections 1302, 5155, 7701 and 8347(c)(d) (1969).

Pursuant to this authority, the Civil Service Commission passed regulations concerning rights of federal employees to appellate hearings. See 5 C.F.R. 772.301 to 772.307 (1969). The employees affected had the same right to notice of any agency action, the right to a hearing, the right to a personal appearance, the right to produce witnesses, and the right to cross-examine witnesses. This covered removals, suspensions, reduction in rank and disability retirement claims. 5 C.F.R. 772.305 (1969).

There was no difference in treatment in adverse actions or retirement claims as contended by the Respondent at the administrative level.

[10] Respondent also asserts that there was a total difference in treatment in the courts between adverse claims and retirement claims prior to 1978. (Resp. Br. 26). It is correct that there were minor differences, but prior to 1978, both types of claims had the

c. Next, the Respondent asserts that the legislative history of the Civil Service Reform Act does not reflect any Congressional intent to grant a direct right of review, either under Section 7701 or 7703 to retirement claims (Resp. Br. 26-29). The reasons argued by the Respondent are that the 1978 history of that Act only discusses adverse actions, and not retirement claims, that Congress did not at that time make any reference in Section 8347 to either Section 7701 or 7703, and that it refers only to employees.

Contrary to the assertions of the Respondent, the legislative history indicates that Congress intended retirement claims to be appealed to the MSPB pursuant to Section 7701 and to the Federal Circuit under Section 7703. The history clearly provides that amendments to Section 7701 covered all appealable actions to the MSPB and were not limited to adverse actions. S.Rep. No. 95-969, 95th Cong., 2d Sess at 51, *reprinted in* 1978, U.S. Code Cong. & Ad. News 2773, 2775. The history also clearly reflects that Section 7703 allowed judicial review of *all* final orders of the MSPB, not merely adverse actions. *Id.* at 62, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2784.

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same right of review in the federal courts under the Tucker Act. They could file their petition in the Court of Claims under 28 U.S.C. 1491 from either adverse actions or retirement claims. *Kephart* v. *United States*, 75 F.Supp. 1020 (Ct.Cl. 1948) (civil service classification); *Elchibegoff* v. *United States*, 106 Ct.Cl. 541 (1947) *cert. denied*, 329 U.S. 694 (1947) (position of federal employee determined by CSC); *Peters* v. *United States*, 408 F.2d 719 (Ct.Cl. 1969) (termination); *Bayley* v. *United States*, 99 Ct.Cl. 598 (1943) (retirement). After 1964, the Congress provided for review in the district courts under 28 U.S.C. 1346. The only difference under the Tucker Act was that the adverse claims were reviewable under the substantial evidence test. *Reid* v. *United States*, 456 F.2d 777 (Ct.Cl. 1972); *Proctor* v. *United States*, 172 Ct.Cl. 608 (1965). Appeals from Civil Service Commission orders of retirement claims were subject to the *Scroggins* standard of review for legal or procedural errors. *McGlasson* v. *United States*, 397 F.2d 303 (Ct.Cl. 1966).

The Civil Service Reform Act provided a statutory basis for the changes in organization that were made by Reorganization Plan No. 2 of 1978, Section 1101, note. The Reorganization Plan specifically included retirement cases. The Civil Service Retirement Act and the Reorganization Plan were prepared as part of the same legislative package and were considered by the same Congress. S.Rep. No. 95-969, *Id.* at 30, *reprinted in* in 1978 U.S. Code Cong. & Ad. News at 2725, n. 1; S.Rep. No. 95-1049, 95th Cong., 2d Sess. 1 (1978); H.R.Rep. No. 95-1396, 95th Cong., 2d Sess. 102 (1978). Section 202(a) of the Reorganization Plan authorized the MSPB to adjudicate appeals formerly heard by the Civil Service Commission, including appeals from "determinations . . . concerning retirement applications and annuities (5 U.S.C. 8347(d))." H.R. Rep. No. 95-1396, *supra* at 10. Congress was very aware that "any action appealable to the Board" as used in section 7701(a) would include retirement decisions made appealable by section 8347(d).[11]

Also, the Civil Service Commission regulations for its appeals which included both retirement claims and adverse claims (5 C.F.R. Part 772 (1978)) were replaced by a statutory scheme (Section 7701), which codified the procedures to be used by the MSPB in hearing appeals. There was no indication either in the legislative history or in the statute itself that appellants from retirement decisions were to be excluded.[12]

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[11] The numerous appeals from agency action transferred to MSPB are listed in H.R. Rep. No. 95-1396, *supra*, at 10-11.

[12] The claims by Respondent that the 1980 Congressional amendment to Section 8347(d) specifically required Section 7701 procedures to be followed only in appeals to MSPB of involuntary mental disability cases confirms its position of Congressional intent is wrong. (Resp. Br. 27, ft. 19).

This argument is unfounded. Since the "sole purpose of the amendment was to expand judicial protection of employees through review of factual findings in a certain subset of cases, it hardly follows that Congress negatively implied its intent to strip employees of review in other cases." *Turner* v. *OPM*, 707 F.2d 1499, 1503.

Likewise, judicial review as previously provided under 28 U.S.C. 1491 and 1346 in the district courts was eliminated. Congress is presumed to have known that both retirement claim appeals and adverse actions appeals were taken to both the Court of Claims or district courts when it passed Section 7703 and to adopt that interpretation when it transferred jurisdiction to review all MSPB decisions to the Court of Appeals or Court of Claims under Section 7703 and to the Federal Circuit in 1982. It never excluded retirement claims from this review, neither in 1978 nor in 1982. Thus, it is presumed to continue. *Lorillard* v. *Pons*, 434 U.S. 575, 580.

Moreover, the Federal Circuit in *Bronger* v. *OPM*, *supra*, held that where the retirement claim is inextricably bound up with any adverse action, there is no basis for denying jurisdiction under Section 7703 on the basis that Section 7703 is only applicable to adverse actions. The same situation is present in LINDAHL. He was terminated by the Department of the Navy due to physical disability (J.A. 10). Prior to his actual termination, he requested the disability retirement annuity (R.I. 83-84). Thus, in this case, both the adverse action and retirement claim are inextricably bound up and there is no basis for denying jurisdiction under Section 7703, even if we accept Respondent's argument that this section only covers adverse actions.

d. Respondent seeks to draw the inference from the 1980 amendment to Section 8347(d) that all retirement cases other than involuntary mental cases are excluded from Section 7703. (Resp. Br. 20). This reading may appear possible if the amendment is read in isolation from the total statute and its history. However, such inference is not plausible after full examination.

The 1980 amendment was concerned with the abuse of agency initiated mental retirement cases of federal employees. Its purpose was to remove the previously existing limitation on judicial review of factual issues in disability retirement cases. S.Rep. No. 96-1004, 96th Cong., 2d Sess. 1 (1980), *reprinted in*

part, 1980 U.S. Code Cong. & Ad. News 5986; H.R. No. 96-1080, 9th Cong., 2d Sess. 2 (1980). The report of the House Committee on Post Office and Civil Service[13] reflects Congressional awareness of the cases construing Section 8347(c) as merely restricting judicial review and not barring it totally. The report also recognized that the MSPB was to have *de novo* review under Section 7701. H.R. Rep. No. 96-1080, *supra*, at 3-5. The Director of OPM supported this position to the Committee. *Id.* at 8-10.

Thus, the history of Section 8347(d) shows that the intent of Congress was to merely expand judicial review in this category of cases. It does not support Respondent's contention that cases of voluntary retirement or involuntary physical disability are thus excluded from Section 7703. *McCard* v. *MSPB*, 702 F.2d 978 (11th Cir. 1983); *Turner* v. *OPM*, 707 F.2d 1499.

2. Respondent next discusses that LINDAHL was required to bring an action under the Tucker Act for a money judgment of retirement benefits either in the Claims Court or the District Court under 28 U.S.C. 1491 or 28 U.S.C. 1346. From those courts, it argues, there would be a right of appeal to the Federal Circuit under 28 U.S.C. 1295(a)(3). It incorrectly cites *Ellis* v. *United States*, 711 F.2d 1571 (Fed. Cir. 1983) and *Morris Mechanical Enterprise, Inc.* v. *United States*, 728 F.2d 497, 498 (Fed. Cir. 1984) for that proposition (Resp. Br. 30-31). The LINDAHL case is appealable under 28 U.S.C. 1295(a)(9).

This argument of Respondent ignores the Congressional purpose in passing Section 7703. Prior to 1978 and the Civil Service Reform Act, review of all civil service appeal decisions was either in the Court of Claims or the district courts. The Senate Committee report made the following observation of this practice:

> The large number of these courts has caused wide variations in the kinds of decisions which have been issued on

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[13] The legislation originated in this committee.

> the same or similar matters. The section remedies the problem by providing that Board decisions and orders (other than those involving discrimination complaints and determinations concerning life and health insurance) be reviewable by the Court of Claims and U.S. Courts of Appeals, rather than by U.S. District Courts.

S.Rep. No. 95-969, 2d Sess. 63, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 2785.

The Act placed judicial review of MSPB decisions in the United States Court of Appeals and the Court of Claims to "encourage more uniform judicial decisions in the Federal personnel area . . ." S.R.No. 95-969, *supra*, at 62, *reprinted* at 2784.

Later, Congress emphasized its desire for uniformity in the review of civil service matters by placing judicial review of all MSPB orders in the Federal Circuit pursuant to the Federal Courts Improvement Act of 1982. That court was created to have "nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity. . ." S.Rep. No. 97-275, 97th Cong., 2d Sess. 2 (1981) *reprinted in* 1982 U.S. Code Cong. & Ad. News, n. 2 at 12. Congress wanted to do away with "inconsistent decisions on the same issue" and to prevent dispersed review where "courts apply the law unevenly when faced with the facts of individual cases." *Id.* at 3, *reprinted* at 13.

The Senate report stated that 28 U.S.C. 1295(a)(9) "gives the Court of Appeals for the Federal Circuit jurisdictionof any appeal from a final order or decision of the MSPB." S.Rep. No. 97-275, *supra*, at 21, *reprinted* at 31. The Federal Circuit recognized this jurisdictional grant in *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1318 (Fed. Cir. 1983) where it stated that all appeals from the MSPB under Section 7701 "must go to this court."

Congress also sought to eliminate the unnecessarily detailed and prolonged process of judicial review under prior law, which involved duplicative review of administrative record in civil service cases first by the district court and then by the

Court of Appeals. S.Rep. No. 95-969, *supra*, at 52, 62, *reprinted in* U.S. Code Cong. & Ad. News, 2774, 2784. This would be a waste of judicial resources. *Polcover* v. *Secretary of the Treasury*, 477 F.2d 1223, 1225 (D.C. Cir. 1973) *cert. denied* 414 U.S. 1001 (1973).

The two-step review by the Claims Court or the district court, then by the Court of Appeals of retirement decisions would be contrary to this Congressional purpose. The dual goals, decisions uniformity and the elimination of duplicative judicial review, would be undermined by accepting Respondent's argument. Aggrieved persons would be required to seek review of MSPB retirement decisions in the Claims Court or the district courts. Some retirement appeals, because they do not involve money claims against the United States, cannot be heard under the provision of the Tucker Act. *Baker* v. *United States*, 614 F.2d 263, 271 (Ct.Cl. 1980); *In Re Jancovic*, 204 Ct.Cl. 807 (1974). Such cases would only be filed in the district court and those decisions would not be subject to review in the Federal Circuit.

In addition, 28 U.S.C. 1295(a)(9) grants exclusive jurisdiction over appeals from a final order of the MSPB to the Federal Circuit. Thus, if this case were before the Claims Court, Respondent could and probably would argue that, pursuant to 28 U.S.C. 1295(a)(9), that court does not have jurisdiction over this matter. However, if Respondent did not argue that position, the Claims Courts might well find on its own initiative that it lacked the necessary jurisdiction based on the decision of the Federal circuit in this case or its own reading of Section 8347. Therefore, to accept Respondent's position would be equivalent to precluding all determinations of judicial review here.

3. The Respondent also argues that any jurisdiction over retirement appeals by the Federal Circuit is precluded by the clear wording of Section 8347(c) which, it claims, manifests a Congressional intent to preclude review of physical disability retirement claims (Resp. Br. 35).

First, the language of Section 8347(c) supports LINDAHL's position that it was only intended to limit review of factual errors in agency action. The finality clause of Section 8347(c) preserves for either the Respondent or the MSPB the underlying factual basis for disability and dependency. The sentence immediately after the finality clause of Section 8347(c) provides that "The office may direct at anytime such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter." Thus, it would seem that the finality clause of Section 8347(c) indicates and is compatible with judicial review of decisions of the MSPB in non-factual matters, such as procedural infirmities or legal errors. *Turner* v. *OPM*, 707 F.2d 1499, 1502.[14]

Next, the language of Section 8347(c) does not provide clear and convincing evidence that Congress intended to foreclose judicial review. This Court has consistently held that the right to judicial review of agency action will not be prevented absent clear and convincing evidence of Congressional intent. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). And where there is doubt or uncertainty, that is sufficient to prohibit the foreclosing of judicial review. *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). Contrary to the assertion of the Respondent, the words of Section 8347 in their entirety do not provide the clear and convincing evidence of intent by Congress to foreclose the review sought here. The finality words when taken in context manifest an intent to limit judicial review and not eliminate it. Congress could have done so by using the same words used in the Veterans Benefit statute, "no other official or court of the United States shall have power or jurisdiction to

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[14] The contention of Respondent that the presumption of judicial review over agency action does not apply in suits for monetary recovery is without basis. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975) (suit for union office); *de Magro* v. *United States*, 636 F.2d 764, 765 (D.C. Cir. 1980) (widow's life insurance benefits); *Carter* v. *Cleland*, 643 F.2d 1, 3 (D.C. Cir. 1980).

review such action." 38 U.S.C. 211(a). Congress used similar language in the Medicare and Federal Employee Compensation statutes, Section 8128 and 42 U.S.C. 1935(j). These latter three statutes are clear and convincing evidence that Congress intended to preclude judicial review which is untrue here.[15] They are unlike Section 8347.

Section 8347 evinces the intention of Congress to bar only judicial review of factual questions of disability and of dependency. *Parodi* v. *MSPB*, 690 F.2d 731 (9th Cir. 1982). This is consistent with the presumption favoring judicial review of agency action for procedural or legal errors.

4. Respondent next attacks the *Scroggins* standard of review of agency rulings on disability retirement. It claims that the *Scroggins* formula was incorrect because the Court of Claims in 1962 had never considered the statutory preclusion of review under Section 8347(c), that the Court's decision in *United States* v. *Erika, Inc.*, 456 U.S. 982 (1982) undermines *Scroggins*, and that the 1980 amendment to Section 8347(c) eliminated the need for *Scroggins*.

The Respondent misses the point in making these arguments to support the decision of the Federal Circuit below. The issue is not what the *Scroggins* court did or did not do,[16] nor the

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[15] The Respondent points to the Federal Employees Compensation Act and the Veterans Benefit Act and cases interpreting them to support its position of non-review in disability retirement. (Resp. Br. 37-38). However, a further distinction is that disability retirement is a vested property right of the federal employee based on his or her contributions from his or her salary. And judicial protection is afforded to property interests. *Dismuke* v. *United States*, 297 U.S. 167, 170 (1930). Veterans benefits are in the nature of a gratuity given by a grateful nation for help. *Koelfer* v. *Johnson*, 355 F.Supp. 243, 251 (D.Minn. 1960). Richard A. Warren, Personnel Administrator v. Feeney: A Policy Decision. 34 *U. Miami Law Rev.*, 343, 346 n.21 (1980). Likewise, federal workers compensation is deemed to be a charity. *Dahn* v. *Davis*, 258 U.S. 421, 431 (1922).

[16] However, the Court of Claims did give careful consideration to the language of Section 8347 and this is clear from the opinion where

effect of *Erika* on *Scroggins*. The central issue is the intent of Congress in passing and amending Section 8347. The best way to interpret the meaning of a statute is to examine its legislative history.

The Court in *Erika, Inc.* did not regard the plain language of the Medicare statute as sufficient in itself to resolve the issue of the preclusion clause. Instead, the Supreme Court felt required to look at the legislative history of the Medicare statute to determine the Congressional intent and to explain the logic behind the preclusion of judicial review. The Federal Court below avoided all references to *Erika, Inc.* because it would have required that it examine the legislative history.[17] *United States* v. *Erika, Inc.*, 456 U.S. 982. The Respondent incorrectly argues that *Erika, Inc.* supports the Federal Circuit's decision in LINDAHL. It ignores the precisely drawn provisions and legislative history of the Medicare statute.

"The legislative history of the 1980 amendment also indicates that Congress amended the statute based, in part, on the OPM's representation that Section 8347(c) already allowed limited judicial review of all disability proceedings . . . [and indicated that] Congress merely wished to expand judicial review for involuntary disability retirement determinations based on an employee's mental condition, not that Congress

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it states that the statute places "a special and unusual restriction on judicial examination." *Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct.Cl.) *cert. denied*, 343 U.S. 952 (1968). This was also true of the courts in *Gaines* v. *United States*, 158 Ct.Cl. 497, 501-2, *cert. denied*, 371 U.S. 936 (1962) and *McGlasson* v. *United States*, 397 F.2d 303, 307 (Ct.Cl. (1966).

[17] The Court in *Erika, Inc.* specifically stated that judicial review was foreclosed in the precisely drawn provisions of the Medicare statute. *Id.* at 6-7. In that sense, the retirement benefits are different from the Medicare benefits. But further, the Court stated that the legislative history of the Medicare statute provides clear evidence of Congressional intent to limit judicial review. *Id.* at 9. No such history exists to support exclusion under Section 8347.

believed the law barred all judicial review of disability determinations." *Parodi* v. *MSPB*, 690 F.2d 731, 736.

The legislative history indicates that Congress was aware of the *Scroggins* rulings and did not intend to alter the effect of those rulings, except to expand the review. H.R. Rep. No. 96-1080, 96th Cong., 2d Sess. 4 (1980). In fact, by reenacting this legislation in 1980 with alterations, it is presumed to have adopted the judicial interpretations of the statute including the *Scroggins* formula to review disability retirements.

Thus, the Federal Circuit was incorrect in failing to read the legislative history of Section 8347 and it erred in its interpretation of that statute by precluding review where Congress only intended to limit review.

5. Finally, Respondents assert that there was no error committed by the MSPB because the burden of proof was correctly placed upon him (Resp. Br. 34-35). Again, Respondent is incorrect.

First, the burden of proof is placed upon the agency because it is so stated in the congressional enactment (Section 7701(c)). It requires that the agency decision be supported by a preponderance of evidence. The legislative history clearly states that the "agency will have the initial burden before the Board of going forward with the case." S.Rep. No. 95-969, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News, 2723, 2766.

As previously shown, Section 7701 was intended by Congress to apply to both adverse actions and disability retirement claim appeals to the MSPB (Reply Br. 6-8). Section 7701 was also interpreted by the MSPB to apply to disability retirement appeals. *Chavez* v. *OPM*, 6 M.S.P.B. 343, 348. The courts have so held. *Turner* v. *OPM*, 707 F.2d 1499, 1501.

Next, the regulations of the MSPB provide that the agency has the burden of proof in any action brought before the MSPB. 5 C.F.R. 1201.56. And these regulations have been drawn up pursuant to Section 8347(d)(1).

So, the MSPB both violated the statutory provision and violated its own regulation. Notwithstanding any law to the contrary, this is a violation of due process and warrants judicial review and reversal of the agency action.

Likewise, the standard of proof used by the MSPB was incorrect. It required LINDAHL to prove that "he has a disease which rendered him totally disabled for useful and efficient service in his last occupied position" (J.A. 40). However, the correct standard of proof is an "inability to perform useful and efficient service in the last job." *Parodi* v. *MSPB*, 690 F.2d 731, 739. This also constituted a due process violation which was entitled to review by the Federal Circuit.

For these reasons, as well as for the reasons stated in our opening brief, the judgment of the Court of Appeal for the Federal Circuit should be reversed.

Respectfully submitted,

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